Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

STEPHEN ANENE EZEOKE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the government satisfy the "preponderance of evidence" standard during sentencing in a credit card theft matter when, in attempting to increase a defendant's base offense level due to aggravating specific offender characteristics, it presents only the uncorroborated assertions of the Probation Officer that the "potential loss" of 325 credit cards exceeded three million dollars, absent any documented proof and/or factual support showing that the three million dollar figure was a realistic and reliable calculation to be used by the court in enhancing a sentence?

PARTIES BELOW

Petitioner, STEPHEN ANENE EZEOKE, *Defendant-Appellant.*

Respondent, UNITED STATES OF AMERICA, *Plaintiff-Appellee.*

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no other reports of opinions delivered in this case other than the Fifth Circuit Opinion which can be found in the Appendix at A1.

JURISDICTION

The Per Curium Opinions, of the United States Court of Appeals for the Fifth Circuit, dated and entered on November 19, 1993 and issued as mandate on January 24, 1994.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, the United States Sentencing Guidelines, Section 6A1.3, recites:

"*. . . In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissability under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.*"

In pertinent part, the United States Sentencing Guidelines, Section 6A1.3, Commentary, recites:

"*. . . The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.*"

In pertinent part, The Federal Rules of Criminal Procedure, Rule 32(c)(3)(D), recites:

"If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing."

In pertinent part, the United States Sentencing Guidelines, Section 2C1.1(b)(2)(A), recites:

"If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit)."

In pertinent part, the United States Sentencing Guidelines, Section 2F1.1, Application Note 8, recites:

"For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information."

STATEMENT OF THE CASE

On April 23, 1992, Petitioner was named in a criminal indictment which charged *Bribery of a Public Official*, in violation of 18 U.S.C. §201(b)(1)(C); *Theft or Receipt of Stolen Mail*, in violation of 18 U.S.C. §1708; and *Unlawful Possession of a Firearm by Convicted Felon*, in violation of 18 U.S.C. §922(g)(1).

On July 16, 1992, Petitioner entered a plea of guilty to Count One of the indictment and on October 9, 1992, went before the Honorable Melinda Harmon, United States District Judge for the Southern District of Texas, for imposition of sentence. Petitioner was sentenced to a term of one hundred and five (105) months imprisonment without parole, to be followed by a three-year period of supervised release.

This case involved a plan where Petitioner was to pay postal workers certain sums of money in exchange for the misdelivery of mail containing consumer credit cards to Petitioner. This plan was interrupted by a governmental "sting" operation conducted under the supervision of the F.B.I. and the United States Postal Service. Petitioner was arrested subsequent to a planned meeting between himself and an undercover postal inspector. During this meeting, Petitioner received 301 misdelivered envelopes which contained 325 misdelivered Citibank Mastercard and/or Visa credit cards in exchange for approximately $5000 in cash, a gold and diamond ring, and a promise to pay an additional $5000 at a later date.

Upon the conviction, pursuant to the plea, the Probation Office was called on to develop the Presentence Investigation Report (PSI) for sentencing purposes. In this

report, the Probation Office submitted calculations which attributed an amount in excess of three million dollars ($3,017,000.00) in "potential loss" to the 325 credit cards involved. This calculation was said to have been based on the total combined credit line of the 325 cards. However, the calculation was submitted without any explanation and/or documentation as to how the individual credit lines amounted to the aforementioned figure. As such, this "potential loss" calculation was submitted to the court without any reliable evidence to support the findings.

At the Sentencing Hearing, neither the attorney for the government nor the probation officer offered any factual evidence which would substantiate or corroborate the "potential loss" figures. Defense Counsel, meanwhile, offered arguments and objections as to: (i) the lack of support and reliability in the calculations; and (ii) that attributing a credit line of about $9300 to each of the 325 cards was unrealistic and therefore, not a reasonable estimate of the range of loss. The court then went on to adopt the calculations as presented in the PSI by the Probation Officer. In so doing, the court never addressed the lack of reliable evidence in establishing the $3,017,000, but rather, stated:

> "*[i]t's clear to me, looking at the big picture, Mr. Ezeoke would have taken and paid for as many credit cards as possibly could be provided and that's what happened and looking at the guidelines and the way the guidelines work, it seems to me that it is clear that the potential for loss was in the three million or so range. So, I'm going to adopt the application of the guidelines to the PSI report, adopt those findings and find an Offense Level 25 and Criminal History Category of 4.*" (Sent. Trans. p. 37). (emphasis added).

The use of these figures resulted in Petitioner's base offense level being raised by thirteen (13) points. This, in turn, raised Petitioner's guideline range from 21-27 months to a range of 84-105 months. As a result, Petitioner was sentenced to a term of 105 months.

On direct appeal, Petitioner, again, challenged this calculation as being unsubstantiated and thereby failing the "indicia of reliability" test, along with arguing that the District Court failed to follow F.R.Cr.P. Rule 32 by not making explicit findings of fact as to the disputed issues regarding the amount involving the credit cards.

The Fifth Circuit Court of Appeals affirmed the lower court's decision. However, this opinion, again, failed to address the problem of there being no evidence showing how and why the $3,017,000 was attributed to the 325 credit cards.

ARGUMENT

A. The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings in sanctioning the lower Court's procedural departure, that the exercise of the Supreme Court's power of supervision is called for.

The United States Court of Appeals for the Fifth Circuit has rendered a decision that departs from the accepted proceedings of the cases below in dealing with a lower court's failure to follow Rule 32 procedures. On the issue of disputed facts in the Presentence Investigation Report:

(1) United States Supreme Court (1972): *United States v. Tucker*, 404 U.S. 443;

(2) 9th Circuit (1993): *United States v. Becerra*, 992 F.2d 960;

(3) 7th Circuit (1993): *Basile v. United States*, 999 F.2d 274, rehearing and suggestion for rehearing denied;

(4) 8th Circuit (1993): *United States v. Hammer*, 3 F.3d 266;

(5) 5th Circuit (1992): *United States v. Sherbak*, 950 F.2d 1095;

(6) 5th Circuit (1991): *United States v. Hooten*, 942 F.2d 878.

In the present case, the sentencing court clearly erred in adopting the facts as presented in the PSI without resolving

the disputes that were raised in regard to the $3,017,000 calculation. The record is devoid of any evidence showing that the total combined credit limit of the 325 credit cards came any where close to the three million dollar figure. In fact, the record establishes that the district court was going beyond the relevant conduct of this crime to reach such a figure. As mentioned above, the court stated:

> "*[i]t's clear to me, looking at the big picture, Mr.Ezeoke would have taken and paid for as many credit cards as possibly could be provided and that's what happened and looking at the guidelines and the way the guidelines work, it seems to me that it is clear that the potential for loss was in the three million or so range.*"

What "would have occurred" is not a factor in the determination of the potential loss. It is the combined credit limit of the 325 credit cards involved in the offense which should be the basis of the sentencing determination, not some indeterminate figure based on "would have", "could have", or any other prognostication. Therefore, not only did the district court fail to follow Rule 32, it also erroneously over-estimated the "potential loss" by what "would have" happened in the future.

On appeal, the Fifth Circuit correctly stated that the measure of potential loss is the combined credit limits of the credit cards. However, that was not the issue. The issue was the dispute surrounding the determination of the $3,017,000 figure, and the failure of the sentencing court to adequately resolve it.

Not only did the Appellate Court fail to address the Rule 32 issue, the statement as to Petitioner failing to meet the burden of proof is contrary to the facts and case law in other

Circuits. According to ***United States v. Hammer***, 3 F.3d at 268, "*[w]hen a defendant contests facts alleged in a presentence report, and the issue is one on which the United States has the burden of proof - the proper base offense level, for example, or a factor that will enhance the sentence - the government must produce evidence sufficient to persuade the sentencing court by a preponderance of the evidence that the prosecution's position is correct.*" (emphasis added).

Petitioner respectfully urges acceptance of review by this Honorable Court, on certiorari, to consider and determine whether the Sentencing Court was clearly erroneous in attributing an amount in excess of threes million dollars to the 325 credit cards, given the facts that such an amount was never substantiated by any evidence whatsoever and, because such figure sets an average credit limit of over $9000 per card, it is a totally unreasonable conclusion. From this evidence, Petitioner clearly should not have been assessed with the 13-point enhancement called for by an amount over $2,500,000. The sentencing court should have held an evidentiary hearing to establish the proper guideline enhancement, given the fact that the credit limits for the 325 cards could have been verified through a more thorough investigation.

Furthermore, this Honorable Court, in considering the above issues, is respectfully directed to the following cases regarding the *indicia of reliability* standard:

United States v. Wise, 976 F.2d 393 (8th Cir. 1992), ***cert. denied***, __ U.S. __, 113 S.Ct. 1592, 123 L.Ed.2d 157 (1993);

United States v. Elwood, 999 F.2d 814 (5th Cir. 1993);

United States v. Shacklett, 921 F.2d 580 (5th Cir. 1991).

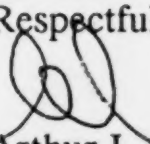
CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

Petitioner should have been afforded an evidentiary hearing in order to establish the proper sentencing parameters in his case. There was no evidence to support the $3,017,000.00 figure, let alone evidence meeting the "*indicia of reliability*" standard. Furthermore, there was a complete disregard to the procedures outlined in FRCrP Rule 32. The sentencing court, over the objections of defense counsel, and without first resolving the disputes, used the disputed figure as a basis for imposing the 13-point enhancement to Petitioner's Offense Level.

Therefore, it is submitted that the government failed to show, by a preponderance of the evidence, that the calculations were correct and, thereby, the subsequent sentence was erroneously determined and illegally imposed upon Petitioner. Because of the lack of any type of reliability as to the credit lines of the 325 credit cards, Petitioner should have the 13-point enhancement removed from his offense level determination, then be awarded an evidentiary hearing to establish the proper level and be resentenced based on such findings.

Respectfully submitted,



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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Filed November 19, 1993)

Case Number: 92-2826
Summary Calendar

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN ANENE EZEOKE,

Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
D.C. NO. CR-H-92-0104

BEFORE: DAVIS, JONES, and DUHE, Circuit Judges[1]

PER CURIAM:

Steven Anene Ezeoke, a Nigerian national living in the United States, was sentenced to 105 months in prison and three years supervised release after he pled guilty to one count of paying a United States Postal Service official to steal credit cards. Ezeoke challenges the sentence imposed by the district court because of that offense, which involved the potential theft of 325 credit cards. The government contends that Ezeoke waived his appeal rights in the guilty plea, but we pretermit that issue and affirm on the merits.

Ezeoke makes two challenges to his sentence. First he argues that the potential loss regarding the credit cards and the actual loss regarding $40,000 in bank accounts he fraudulently set up should not have been considered in sentencing. Next, he argues that evidence of the amount of the potential loss was insufficient, and the district court's findings were inadequate. We disagree with both these contentions.

The district court adopted the factual findings and the application of the guidelines to the offense conduct as recommended in the PSR. In the PSR, the probation

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

department calculated Ezeoke's base offense level according to USSG § 2C1.1, as he pled guilty to violating 18 U.S.C. § 201(b)(1)(C). Relevant to this appeal, the probation department increased his base offense level by 13 levels, because USSG § 2C1.1(b)(2)(A), cross references USSG § 2F1.1, because the total potential/actual loss was over $3,000,000. The PSR arrived at its total sum by including both the available line of credit on the 325 credit cards plus the actual loss to financial institutions, Ezeoke had separately defrauded by setting up false bank accounts. This court has expressly approved the use of combined credit card limits on stolen credit cards as the loss for sentencing purposes in a theft case. ***U.S. v. Sowels***, 998 F.2d 249, 250-51 (5th Cir. 1993). ***Sowels*** applies the loss concept of § 2B1.1. Further, it was proper to include the total potential/actual loss as constituting relevant conduct under USSG § 1B1.3. Ezeoke's use of false identification to facilitate obtaining cash and merchandise by means of stolen checks and credit cards could easily be viewed as a common scheme. Thus, the application of the guidelines was legally correct.

Ezeoke also challenges the $3,056,694.60--+ amount of the actual/potential loss calculated in the PSR and adopted by the trial court. Contrary to his assertions, the district court followed the appropriate methodology and specifically adopted the statements in the PSR. Ezeoke hotly contested the amount as being based on speculation, but he offered absolutely no evidence to prove his point. The district court could properly prefer to believe the statement in the PSR, which she found was based on interviews with the government agents who ensnared Ezeoke. In short, the district court gave Ezeoke an opportunity to disprove the statements in the PSR, as required by § 6A1.3 of the Guidelines. He was not able to do so.

The sentence imposed by the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Filed January 10, 1994)

No. 92-2826

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHEN ANENE EZEOKE,

Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(January 10, 1994)

Before DAVIS, JONES and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

REHG-4

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

CORRECTED

JUDGEMENT OF THE UNITED STATES DISTRICT COURT

(Filed October 15, 1992)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

v.

STEPHEN ANENE EZEOKE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: H-92-00104-01

Joe Porto, Jr. and W. J. Dedrick, III
Defendant's Attorney

THE DEFENDANT:
(xx) pleaded guilty to count 1 on July 16, 1992
( ) was found guilty on count(s) _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title/Sect	Nature of Offense	Date Offense Concluded	Count Number(s)
18:201(b)(1)(C)	*Bribery of a public official*	*3/24/92*	*1*

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

Count(s) 2 and 3 (are) dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 1, which shall be due immediately: CLERK, UNITED STATES DISTRICT COURT, Attention: Finance, P.O. Box 61010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 420-21-3831
606-03-6038
Defendant's Date of Birth: 11/17/62

Defendant's Mailing Address:

1301 Franklin
Houston, Texas 77002

Defendant's Residence Address:

1301 Franklin
Houston, Texas 77002

10/09/92
Date of Imposition of Sentence

Signature of Judicial Officer
MELINDA HARMON
United States District Judge
Name & Title of Judicial Officer

10/14/92
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIVE (105) MONTHS on Count 1.

The court makes the following recommendations to the Bureau of Prisons: None.

[xx] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
- [ ] at _____ a.m./p.m. on _____.
- [ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- [ ] before 2:00 p.m. on _____.
- [ ] As notified by the United States Marshal.
- [ ] As notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL
By:_____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on Count 1.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

(xx) The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

(xx) The defendant shall not possess a firearm or destructive device.

If the defendant is deported during the supervised release term, supervision becomes inactive. If the defendant returns, the defendant shall report to the nearest United States Probation Office immediately. Supervision by the probation office reactivates automatically upon the defendant's reporting.

The defendant is required to provide the probation officer access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

OR

The Court adopts the factual findings and guideline application in the presentence report except

Guideline Range Determined by the Court:

Total Offense Level: 25
Criminal History Category: IV
Imprisonment Range: 84 to 105 months
Supervised Release Range: 2 to 3 years
Fine Range: $10,000.00 to $100,000.00

[X] Fine waived or imposed below the guideline range, because of inability to pay.

Restitution: $ N/A

[ ] Full restitution is not ordered for the following reason(s):

(xx) The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following reason(s):

APPROVED AS TO FORM: RMB

TRANSCRIPT OF SENTENCING HEARING

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Criminal Action No. H-92-00104-01

UNITED STATES OF AMERICA,

v.

STEPHEN ANENE EZEOKE,

SENTENCING TRANSCRIPT

T 2: 15-20

MR. PORTO: They make a presentence investigation report, they go to the prosecution's files and the agent's files they put it in there, it goes to you, you are sitting there reading the PSI report and you are forming an opinion as to what to do with my client based upon what is in that presentence report. **I am objecting to -- what if some of the stuff is just a flat out lie**.

THE COURT: Look, you are objecting to the system.

MR. PORTO: No, I'm not I am objecting to the information provided in here.

THE COURT: Well, I looked at this report and I have no reason to doubt anything in this report, no reason whatsoever until you bring me something that makes me doubt it.

MR. PORTO: Right.

THE COURT: And if the probation officer interviews Postal Inspector T. Moore who tells the probation officer what happened, what the relevant conduct was surrounding this count that he pled guilty to, you know, you are suggesting I bring, I guess, I don't really know what you are suggesting, I guess you are suggesting we bring T. Moore in here and have her put on the stand a day or two and you get to cross examine her and based on what she says and your cross examination I make my determination.

MR. PORTO: Short of that, Judge, a lot of the stuff that she would say on the stand wouldn't be admissible to you because it may be hearsay.

THE COURT: But I get to consider hearsay.

MR. PORTO: I understand that. So I'm telling you that this hearsay, you can't believe everything you hear.

THE COURT: Well, and I don't believe everything I hear.

MR. PORTO: All right, I know that.

THE COURT: But, you know, I don't know what I can do about the fact that this is in the presentence investigative report.

MR. PORTO: Again, I am not objecting to the presentence investigative report.

THE COURT: You just don't want me to consider it.

MR. PORTO: I don't want you to consider some of the information contained therein. I want you to focus in on the bribery offense, how it occurred, when it occurred, that's it, not all this bank fraud stuff.

THE COURT: So you want me to sentence him in a vacuum.

MR. PORTO: That's what he pled to. Not a vacuum, but the information surrounding that bribery. This other stuff has nothing to do with the bribery. Would you say that this stuff by agent Sly about opening a bank account has anything to do with this bribery? It doesn't, not none whatsoever. It doesn't relate to it.

MR. PORTO: Because they are attempting to give that as monetary amounts to the potential loss. $3 million worth of potential loss here. That's unbelievable. Credit cards under their control they never intended for him to actually use. The numbers were never verified as far as the amounts. In fact, he calls one at the time and says there's a $15 balance on one.

THE COURT: What was the bribery for, why was he bribing the guy; to get the credit cards.

MR. PORTO: To get the credit cards, the offense that was committed. Boom, that's it. You think the government was intending for him to take 325 credit cards out, no way. If they get up there and say that then we are spending a lot of taxpayers' money for them to be very liberal with American Express.

THE COURT: I don't think it has to do with the government's intent.

MR. PORTO: Right. So, how can they say that this is the potential loss, they can they say that.

THE COURT: I assume that's a rhetorical question. Let's go on, talk some more about your objections.

MR. PORTO: I don't want to sit here, you know, I feel like I am whining to you and I am not, I am being very sincere.

THE COURT: I know you are being sincere. I'm anxious to hear what you have to say.

MR. PORTO: Not too anxious.

THE COURT: It's just hard for me to accept what you are saying because what you are doing is objecting to the system of presentence investigative reports. You do not like the way they are prepared. And, you know, I could sit here and say I agree 100 percent, but that's not going to change the way there are prepared and not going to change the way sentencing hearings go.

MR. PORTO: But my calculations under Exhibit 10 where I calculated the amount, it does make a difference. The information contained therein does make a difference. Heck, they were my best buddies when I was a prosecutor, they did my job for me.

THE COURT: No, they didn't. They did a job for me. They didn't do a job for you. You might have liked the job they did, but they didn't do it for you.

MR. PORTO: Okay, I liked the job they did through what they did for the judge. I'm not indicting all of them, Judge. It's just that how in the world is a presentence investigation report going to encompass the defendant's version of the offense if the PSI author doesn't go out and talk to Henry Okafor or Mr. Emex.

THE COURT: I thought you said Henry Okafor and Mr. Emex were confidential informants 1 and 2. Didn't you just say that?

MR. PORTO: Henry Okafor was one, not Mr. Emex. See, how can they go and find out their version of the events. If they're getting the agent's version of the events, why don't they go and get the defendant's or the other people involved in this, their version of the events.

THE COURT: Did they not talk to Mr. Ezeoke?

MR. PORTO: Yes, they did talk to Mr. Ezeoke.

THE COURT: So they got his version of the events.

MR. PORTO: They got his version, but what about all the individuals they named. If the agent says; why don't you talk to Agent Sly, why don't you go talk to Agent Millard of the FBI. What if Stephen Ezeoke says, why don't you talk to Henry Emex and Henry Okafor and this other guy, Agabul and that's not done. My point is it's one-sided, it's not complete. We come back to my original thesis; it's not complete, therefore, if it's not complete, you have to focus in on the offense itself. And if we are looking at the offense itself, under potential monetary loss, it's not $3 million, it's not.

THE COURT: Is it your position this $4,056,694.60 had to do with bank fraud or is this not completely relating to the 28 credit cards?

MR. PORTO: It's not only relating to the credit cards, it's relating to a bank fraud, as well. It's a mixture of funds. That's why I'm just asking you to look at the potential monetary loss at any time in that area for actual use of a credit card, actual use, if any, and the bribe amount itself, which is $9,995....

T 2: 22

MR. PORTO: ...Paragraph 25, we object, again, to the dumping of the credit cards, exaggerated lie beyond the actual value. And we cite ***U.S. v. Huey*** in that regard, that this court can only consider for restitution purposes actual

loss. If that's the case, then you can only really, or you should only really consider the actual potential loss at the time. The government cannot contend that they actually wanted him to use 325 credit cards. That's outlandish behavior...

T 2: 24

MR. PORTO: ...Paragraph 32, another good example of dumping -- well, there's two paragraphs here, and we brought this to the attention of the probation office, there's paragraph 32-A and then there's 32-B, they didn't label it A and B, but there's two separate paragraphs that weren't numbered and there's a vast disparity between 32 between $39,000 and unverified potential loss of $3,056,694.60. I think it's gross hearsay to think that this is any kind of potential loss...

T 2: 27

THE COURT: Let me go through this with you. Paragraph 50, you accept that's correct, calculation 10 there?

MR. PORTO: Yes.

THE COURT: And you would not add the 2 or you would add the 2 in paragraph 51?

MR. PORTO: I would add just 2.

THE COURT: But you would not add the 13?

MR. PORTO: Correct.

THE COURT: Then you would give him a two-point reduction?

MR. PORTO: Right.

THE COURT: That would then come up with 10?

MR. PORTO: Correct....

T 2: 36-37

THE COURT: I'm going to make my ruling on your objections at this point:

I'm basing, as I've indicated before, the way this works is I get a presentence report which is the result of the efforts of the probation officer to find out what the relevant conduct is, what the background of the individual is, and to give me a full picture of what goes on. Specifically, the probation officer in this case relied, it seems to me, from reading and rereading the report, relied primarily upon the testimony or his interviews with inspector Williams and inspector Moore, both of whom who dealt directly with Mr. Ezeoke. He also relied on his interview with Mr. Ezeoke, which is quoted, ostensibly, in ten paragraphs, that is, paragraphs 38 through 48 in the PSI. I have absolutely no reason to believe that Inspector Williams and Inspector Moore were not telling the probation officer the truth about what happened and certainly it is enough for me to rely upon their interviews to make my factual determinations. And, for that reason, I'm going to adopt the factual findings of the PSI as my own findings.

Now, we've also heard some objection about the application of the guidelines to the PSI. It was clear to me that this bribery was one in which Mr. Ezeoke certainly knew exactly what was going on, it was his idea, and I think it's a little unfair to say that the agents had control over how many cards they provided him, because, and I am quoting from paragraph 19 of the report: "At the conclusion of this meeting Ezeoke asked Williams to steal 20 more credit cards for him on March 17, 1992. Inspector Williams said Ezeoke had phone conversations and Williams was urged to steal credit cards from the mail, for which he would be given one hundred dollars apiece. Specifically Ezeoke told Williams, 'get as much as possible'. Williams stated he would get as many as he could. Ezeoke replies, 'you are talking about money right here, you've got to work hard if you want to make big bucks, get as much as -- I'm going to throw the hundred dollars in your face.' And it was at that point that Williams said he would try to steal a tray of credit cards."

So I don't think you could say this was a situation in which the agents were trying to somehow force credit cards on Mr. Ezeoke. It's clear to me, looking at the big picture, Mr. Ezeoke would have taken and paid for as many credit cards as possibly could be provided and that's what happened and looking at the guidelines and the way the guidelines work, it seems to me that it is clear that the potential for loss was in the three million or so range. So, I'm going to adopt the application of the guidelines to the PSI report, adopt those PSI findings and find an Offense Level 25 and Criminal History Category of 4.

T 2: 38-42

MR. PORTO: ...Your Honor, May I ask a question?

THE COURT: Yes.

MR. PORTO: In regard to your rulings or overruling my objection to the presentence report, are you saying you are overruling my objections to the other related conduct, are we talking about the social security aspect and the other bank fraud allegations?

THE COURT: Yes.

MR. PORTO: And you are considering that as a potential loss, as well, to be figured in?

THE COURT: Well, it seems to me, I mean, the way I read the report, they are talking about the credit card scheme, the scheme he had going with these credit cards. And this tray of credit cards that he bribed -- this group of credit cards, there's several different bribes involved in all these credit cards simply went to the next stage, which had to do with the banks. So, yes, I am considering all that.

MR. PORTO: Okay. It's my understanding, though, the credit cards they provided him were not used for this bank.

THE COURT: They weren't used for anything.

MR. PORTO: Correct.

THE COURT: But that doesn't mean that wasn't a potential loss. There was a potential for the use and that's all the guidelines talk about....

THE COURT: I'm not certain I know what you are talking about.

MR. PORTO: You are considering the bank fraud as part of the credit card bribery offense, is that fair?

THE COURT: I'm not certain I know what you are talking about.

MR. PORTO: Okay. I'm saying that the alleged offense for this social security and opening up these bank accounts with false ID's and that has something to do with the bribery offense in figuring in the potential loss.

THE COURT: You are going to have to give me a moment, I don't know what paragraph are you talking about?

MR. PORTO: Okay, I will go right to it, then, Judge, paragraph 32. And the loss is as shown under paragraph 32-A and I guess this 32-B, as figuring part of the potential loss of $3 million, or is the actual loss.

THE COURT: As I understand potential loss, and I hope someone will correct me if I have misunderstood, the potential loss in terms of these credit cards, what he could have used the credit cards for and how much money we're talking about if he had used the credit cards to their maximum.

MR. PORTO: Maybe that's why I'm taking issue with this $3 million is not just reflective of those credit cards he never got, the 325 credit cards don't amount to $3 million something. The $3,056,000 takes into effect the loss of these other allegations of bank fraud, has nothing to do with a bribery offense.

THE PROBATION OFFICER: Your Honor, in paragraph 32, the information contained in there was included because it was considered part of the relevant conduct under 1A1.3 and A2 as part of the same common scheme in this credit card scheme and fake driver's licenses, that's why it was included. Of the 325 credit cards, those credit cards had a value of $3 million, roughly $3.1 million, I believe the report says $3,017,000. The amount in paragraph 33, the 3 million 56, includes --

THE COURT: Includes the $39,000

THE PROBATION OFFICER: Well, that includes, the 39 thousand includes the credit cards that were given to the defendant earlier that he ran up to a maximum, plus the money from the banks in the paragraph above that which totals about $100,176.90. If that money is taken away from the potential loss, it still has no effect on the guidelines.

THE COURT: Is that what you are talking about? I'm still not clear about what you are asking.

MR. PORTO: Yes, that and others, Judge. I don't this $3,056,000 is ever broken down for you to make a finding that has something to do with the bribery offense. That's the problem here. There's been no evidence to suggest that these credit cards amount to that amount.

MR. DAVIS: Judge, I think --

MR. PORTO: You know how limits go on credit cards, Judge.

THE COURT: Yes.

MR. PORTO: I don't want to say anything, but my wife is aware of those limits.

THE COURT: It says here: "The total credit life of 325 cards is $3,017,000." It says that in paragraph 25.

MR. PORTO: All right.

THE COURT: And then the other paragraphs talks about this particular card had been such and such thousands of dollars had been charged on this card and such and such thousand dollars had been charged on that card. Then we have got the breakdown of the 20-something thousand dollars of the bank fraud in paragraph 30, whatever it is.

MR. PORTO: But we don't have the breakdown of the balances on these credit cards that they are saying.

THE COURT: I understand that's your position, and I am sure the 5th Circuit would be very interested in it, but, for me, it's enough. It's enough for me to say that the potential loss associated with this bribery, if you look at all the relevant conduct of this individual is $3,056,694.56 which bumps it up another 12 points.

MR. PORTO: Okay. I understand your ruling.